81-2346

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

WILLIAM G. REXROAT,
Petitioner,
-vs-
RUSSELL THORELL,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

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R. R. 1
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QUESTION:

When a party purchases two tracts of farm land under separate contracts, from different parties, in different years, should said party have the right to divide and sell one tract separately of the other without any encumbrances one to the other?

When said tracts for years were serviced by two separate public highways, and a west central portion of one highway is officially vacated under the Illinois road and bridge Statutes which specifically provide that any person owning land within 2 miles of any portion of highway so vacated, shall still have reasonable access to farm land he owns, can this right of access ever be terminated at some spurious future date if certain portions of land abutting thereon are caused to be inaccessible due to being severed by a natural water course? Would not this access right run with the land thereafter

as an "incorporeal hereditament", e.g., a right-of-way over any adjoining land[s] said public highway traversed?

After the west central portion of the highway was officially vacated, leaving a short west portion and an east portion for use by abutting landowners thereon, would it not be unreasonable, untenable, and "jurisdictional overreaching" for the Courts of Illinois to find the east portion abandoned and not essential to the petitioner herein and apparently recognizing the short west portion servicing only one farm residence?

Is it not deprivation of land, and an inhibition to the U.S. Constitution, Section 1., of the Fourteenth Amendment, for the trial court to combine the State statutory provisions of vacation with the equitable doctrine of abandonment and thereby deprive an abutting landowner access to, and full beneficial use of, farm land?

TABLE OF CONTENTS

Questions Presented..... 1

Opinions Below..... 3

Jurisdiction..... 3

Constitutional Provisions..... 4

Statement..... 5

Argument..... 14

Conclusion..... 27

Appendix:

Opinion of Trial Court .....App. 1
Motion For Rehearing .....App. 19
Order, Trial Court .....App. 29
June 13, 1979, opinion reaffirmed
Evidence Deposition .....App. 30

Opinion of the Illinois .....App. 36
Appellate Court reversing judgment
of Trial Court, Rexroat et. al., v.
Thorell, 90 Ill.App3d 311, 413 N.E.2d
1, (1980)

Opinion of the Illinois .....App. 53
Supreme Court reversing judgment
of Appellate Court, Rexroat et. al.,
v. Thorell, Docket No. 54458, (1982)

Order, Illinois Supreme Court ..App. 72
March 25, 1982, denied petition
for rehearing

Diagram for Illinois Supreme ...App. 73
Court Opinion

Plat, Section 32 and 33 of .....App. 74
Emmet Township, McDonough County,
Illinois (1913) of Exhibit 1

TABLE OF AUTHORITIES

Barnes v. Kent, 296 So2d 881 — 22

Braden and Rush v. Board of Supervisors Pottawattamie County, Iowa 157 N.W.2d 123 — 22

Department of Public Works and Buildings v. Wilson & Co. Inc., 62 Ill 131, 340 N.E.2d 12 — 17

Hensen v. Green, 113 N.E. 982 — 23

Illinois Rev. Stat. 1977, Chapter 121, Section 2-202 — 11

Illinois Rev. Stat. 1979, Chapter 121, Section 6-301 et seq. — 9

Illinois Rev. Stat. 1979, Chapter 121, 6-305 — 15,16

Rexroat v. Thorell, 90 Ill App.3d 311, 413 N.E.2d 1 — 25

Rodgers v. Hess, 325 Ill. 603, 156 N.E. 811 — 20,23

Stevenson v. Meyer, 10 Ill. 2d 335, 139 N.E.2d 740 — 23,24

Taylor v. Wentz, 153 N.E.2d 812 — 24

Verh v. Morris, 410 Ill. 206, 211. 101 N.E.2d 566 — 23,24

Walden v. Bourn, 296 N.E.2d 92 — 24

References:

1 C.J.S. Abut, p. 406 — 21

39A C.J.S. Highways p. 672 — 18

p. 847 — 25

p. 850 — 18

73 A.L.R. Highways p. 681 — 21

OPINIONS BELOW

The opinion of the Circuit Court of McDonough County dismissed petitioner's complaint and the relief therein requested denied, and appears at App. 1 - 18.

The opinion of the Illinois Appellate Court reversing the judgment of the Circuit Court is reported at 90 Ill. App. 3d 311, 413 N.E. 2d 1 (1980), and is reproduced in the appendix at App. 36 - 52.

The opinion of the Illinois Supreme Court reversing the judgment of the Appellate Court, Docket No. 54458, (1982) and appears at App. 53 - 71.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. par. 1257 (3). Petition for rehearing was denied by the Supreme Court of Illinois on March 25, 1982 (App. 72), and this petition for writ of certiorari is timely filed thereafter

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment which provides as follows:

> . . nor shall any State deprive any person of life, liberty, or property, without due process of law;
>
> . . nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT:

On August 4, 1978, counsel for petitioner filed an amended complaint for injunction and declaratory relief praying that the Circuit Court of McDonough County Illinois, determine property rights to the remaining east portion of an old road crossing a wooded pasture owned by the respondent herein, and servicing approximately 15 acres of farm land.

The petitioner herein, owns two contiguous farm properties in joint tenancy, purchased under separate contracts.

The first tract purchased during 1960 and 1961, described by the trial court, as the East Half of the Southeast Quarter of Section 32, and hereinafter referred to as the "East Tract".

The other contiguous tract purchased in 1965, and not described by the trial court, consists of 45 acres of the West Half of the Southeast Quarter of Section

32, and hereinafter referred to as the "Western Tract". Both above tracts are in Township 6 North, Range 3 West, McDonough County, Illinois, and hereinafter referred to as Emmet Township.

The petitioner testified that during 1968, approximately 22 acres had been conveyed along the entire southern half of the East Tract. Prior to conveying this tract, petitioner had contacted the Emmet Township Clerk, (R-95)[1] trying to determine the legal status of a certain public highway petitioner was using as access to farm land and shown on a 1940 plat book. Having received only hearsay information from the Clerk, petitioner reluctantly reserved an easement through

[1] (R-___.), are references to the Report of Proceedings. Exhibits 1 to 24, includes a 1913 plat map of Emmet Township, Survey of the road, and 21 photographs of the road area. A drawing by the petitioner presented at the Appellate Court hearing is also enclosed by separate mailing.

a narrow wet marshy flood plain area approximately sixty feet from the east bank of Spring Creek adjacent to the bridge and referred to as a swamp. (R-37, 70,98,99,100.) Following the trial in 1978, the petitioner quit claimed said easement to the owners of the 22 acre tract as it provided no reasonable access and had never been used.

In 1968 the respondent herein purchased certain property in fee in the West Half of the Southwest Quarter of Section 33, Emmet Township, and referred to as the 80 acres. (R-115.) The 80 acres is adjacent to petitioners East Tract in that they share the boundary line between Section 32 and 33.

At all times prior to and during ownership of the East Tract, said tract has been severed by a nonnavigable stream known as Spring Creek. (R-25,35.) The water course divides the East Tract so

that the eastern most parcel of the East Tract consisting of approximately 15 acre (7 tillable), is inaccessible from any part of the western parcel of the East Tract save for a bridge crossing the water course on the south public highway. The only highway now servicing any of the petitioner's contiguous property, is the south public highway that passes along the southern boundary of the Western Tract, but at no place does it come in contact with the eastern most parcel of the East Tract severed by the water course. (App. 74.)

A certain public highway referred to as the "old road", was established by more than 15 years use by the public. (App. 4,7,74.) (Exhibit 1). During 1947 a west central part of the old road in Section 32 was vacated pursuant to the statutory precursor to the present road and bridge chapter sections on procedures

on vacating township and district roads. See Ill. Rev. Stat. 1979, Ch. 121, Sec.6-301, et. sequence. (App.27,28.) This fact was verified by testimony of the respondent and referred to by the respondent's counsel. (R-141-143,165,166.) This was further verified by the evidence deposition of Ervin Dale Kitch, a former highway commissioner in office at that time who had worked on the old road. (App.33, 34,35.) The west central portion vacated is marked "X" near a farm residence, and thence east on the road to "Z" next to the petitioners west fence line. (R-106 107.) (App.34,35.) No further official action was taken on the remaining "short west portion" marked "W" to "X", or the east portion marked "Z" to "Y" on exhibit 1. (App. 35,74.) (R-107).

The petitioner and his predecessor in title used the east portion crossing the respondent's 80 acres from 1951 to 1978

openly and without permission. (R-27,43 53,88.) (App.14,15.)

A west hill sector of the east portion marked "A" on exhibit 24, was obstructed by fallen trees and the owners of the East Tract deviated to the adjacent south side of the road to reach the eastern most parcel. In the spring of 1970 the respondent constructed a fence across such portion of property being used by the petitioner. With approval of the then highway commissioner, petitioner cleared area "A" that allowed access to the land. (R-27,51,52.) At all times after 1970, the respondent objected to petitioners use of the road. (R-66,75,76)

October 6, 1975, the petitioner attended the regular meeting of the Emmet Township Board of Trustees and requested documents that would prove the status of the old road. No documents were provided by the Board. (R-95)

A bench trial was held Sept. 15, 1978 and petitioner presented three counts for relief; (1) easement implied by necessity (2) easement acquired by prescription (3) existence of a public highway established by 15 years continuous use by the public.

The trial court rejected the first two counts of relief, but went on to find that:

"The old road was used as a public highway from approximately 1913 to 1942, and thereby was established as a public highway by user for more than 15 years continuously Chapter 121, Ill. Rev. Stat. 1977, Section 2-202."

However, the court went on to find that:

"The public highway which formerly existed on what is now called the "old road", was long ago [around 1942 or 1943] abandoned by the highway authorities, if not formally vacated. I would therefore find that there is no longer any public highway across defendant's land as claimed by plaintiff."

Following the trial court's opinion, February 28, 1979, and prior to a rehearing May 14, 1979, (App.19) the petitioner

had obtained official documents from the township Clerk consisting of (5) pages 175-175 inclusive and signed by Mr. Kitch highway commissioner verifying testimony throughout the trial. Petitioner asked counsel to have them entered as corroberative evidence that certain antecedent procedures were taken to vacate the west central portion of the road. By not allowing this document to be certified and entered, the trial court deprived petitioner of prima facie evidence. (App. 23-26.) These records would have proved the township recognized the distinction between vacation and abandonment and for the trial court to combine the two in the opinion, it was stated by counsel, "in effect deprives my client of proper rights without any due process of law."

The trial court reaffirmed its judgment denying all three counts of relief. Subsequently the petitioner appealed and

the Appellate Court reversed the trial court's judgement, stating:

"No evidence of any type of formal vacation by local authorities was introduced. (App.43). Whether the plaintiffs retain a private easement in the abandoned road as abutting landowners appear to be a question of first impression in Illinois. (App.45)Referring to 150 A.L.R. 644, (1944), (App.46), the Court stated, "we elect to adopt the position expressed in those rules."

The Illinois Supreme Court reversed the Appellate Court, stating:

"The above principles are not directly applicable to the factual situation with which we are presented, as the appellate court noted, because there is no evidence that a private easement prior to the creation of the public way, and the old road does not abut the plaintiffs' land but runs to and through it. (App.65) Indeed, one witness testified that in 1937 the ford in the creek provided good access but that the creek had substantially changed over the years. (App.70) . . . . We thus hold that plaintiffs failed to establish that the use of the old roadway at the time of the public abandonment was essential to the beneficial enjoyment of the land now owned by the plaintiffs, and, therefore, a private easement did not then arise and does not now exist." (App.70,71.)

[2] The other party to the proceedings in the Illinois Supremd Court: Mary Ruth Rexroat.

ARGUMENT

The trial court found that the public highway which formerly existed on what is now called the "old road" was long ago abandoned by the highway authorities, if not formally vacated. This conclusion has been sustained by the Appellate Court and the Supreme Court of Illinois. The year of the abandonment of certain portions of the road are questionable.

Petitioner's main witness a former highway commissioner of Emmet Township for approximately 29 years, expressly stated that a west central portion of the old road between the petitioner's home and another abutting landowner residing thereon, was officially vacated around the 1950s. (App. 34) The Township Board was petitioned to vacate the west central portion during 1947, and no official action was taken thereafter to vacate the short west portion with termini

on the west public highway or the east portion with termini on the east public highway. Therefore the conclusion of the trial court that the old road became abandoned around 1942 or 1943 would be an error of judgment.

The trial court stated it would seem that if there is a remedy on abandonment in these circumstances it would be analogous to the remedy on vacation. (App.18)

The petitioner herein has a legally cognizable property interest in the east portion of roadway crossing respondent's land.

In Illinois, express statutory recognition of petitioner's right in the roadway in question can be found at Ill. Rev. Stat. 1979, chapter 121, Section 6-305. That statute provides in pertinent part that "no road shall be . . . vacated unless the highway commissioner finds that such . . . vacation is in the public and

economic interest and further finds that any person residing or owning land within two miles of any portion of the road proposed to be vacated . . . shall have reasonable access by way of motor vehicle . . . to farm lands he owns or operates and to community and trade centers after the road is . . . vacated.

At the very least, this statute alone provides the petitioner with a legitimate claim of entitlement of access to his farm land. Perhaps more importantly, however, is the fact that Section 6-305 reflects the widely held notion that a private property owner's right of access to a public highway cannot be completely done away with without just compensation. In Illinois it has been found that "right of access . . . is a private property right in ownership of real estate abutting a highway. When such right is taken or materially impaired by action of the

State the property owner is entitled to compensation." Department of Public Works and Buildings v. Wilson & Co. Inc., 340 N.E.2d 12, 62 Ill. 131 (1975) The Supreme Court of Illinois noted in Wilson that this principal of law has been apposite even under the (1870) Constitution of Illinois.

The 1913 plat map of Emmet Township exhibit 1, (App.74) shows that the East Tract was divided into a north and south 40 acre tract and owned by different parties. Two township highways serviced the East Tract, the south public highway and the old road. The East Tract continued to be divided until around 1943 or 1945, when the then owner of the north 40 purchased the south 40 and moved there in the late 1940s. (App.33) After 1947, when the then owner of the north tract moved to the south forty, the township discontinued to maintain the ford structure

crossing Spring Creek. (App.33) Illinois Law and Practice, chap. 1, Definition of Bridge:, A bridge is a structure over a river, creek, water course, or obstruction in a highway so as to make a continuous roadway. (14,15)(1914) Op. Attorney General of Illinois. This in effect caused the east portion of road to become cul de sac from the east bank of Spring Creek to the east public highway. See 39A C.J.S. p. 850, par.131, note 43, 44; the abandonment of a part of a highway, regardless of the proportion it bears to the total length, does not constitute abandonment of the portions still used, even though that portion is a cul de sac; C.J.S. p. 672, note 36; it is not essential that both termini of a highway connect with a public highway or place of public resort, and a cul de sac may be a public highway. In their opinion the Supreme Court noted, one witness testi-

fied that in 1937 the ford in the creek provided good access. (App.70) However it should be stated that the township highway authorities were maintaining the crossing at that time. (App.33) (R-13)

The petitioners predecessor Mr. Lundberg, purchased the East Tract a mere 4 years after the vacation of the west central portion in 1947. During 1968 the petitioner divided the East Tract, with the presumption that he would retain the same access rights and privileges to use the east portion of road as did his immediate predecessor in title and all other past title holders of said tract.

The Appellate Court or the Supreme Court could not make a proper assessment of the case due to the fact certain antecedent actions by township authorities were not allowed to be entered into the record. (App.23-25) The trial court at no time referred to the testimony of the

former highway commissioner in the opinion or take judicial notice of the documents offered by the petitioner. These acts alone were discretionary and caused what the higher courts referred to as a question of first impression in Illinois. In Rodgers v. Hess, 156 N.E. 811;, (1927) Laws 1871-72 p. 691, and 1883, p. 136, par. 52; Providing that record of town clerk or certified copy thereof and papers relating to establishment of road should be prima facie evidence that antecedent provisions were complied with. It was stated:[1]

[1]"We should presume e.g., (actions concerning roads by highway officials of the county or township) that the antecedent proceedings had been regular, subject however to be rebutted by the other party. If we go behind the order, I know not where we might stop. Should the plaintiff show all correct proceedings were taken by highway authorities relating to highways? Should such a rule be adapted, most, if not all, of the public roads in older counties might well be shut up to-morrow with impunity."

The Appellate Court and the Supreme Court stated the old road does not abut the petitioner's land but runs to and through it. (App.48,65) The testimony during the trial and the Kitch deposition would prove that the petitioner's land does abut the highway, and dead ends at the petitioner's east line of the East Tract or east bank of Spring Creek. In 1, C.J.S. p. 406, (4) Abut: Term "land abutting on a road means lands adjoining, coming together with, contiguous to, meeting, or touching a roadway.

The petitioner who is not a construction engineer should not be forced to construct new bridges over a tortuous creek or roads through a swampy flood plain area when he and his predecessors used a free access right of way via the new bridge across said creek. Annot. 73 A.L.R. 2d, p. 681; whether an abutting owner has been denied access that is rea-

sonable or free and convient is a question of fact not law. In Braden and Rush v. Board of Supervisors of Pottawattamie County, Iowa, 157 N.W.2d 123, (1968);, held that when two portions of tract of land employed as a single unit were operatively inaccessible one to the other except by passage over secondary road, and bridge on that road abutting such property was vacated, here was a "severance" of the two portions of land for which landowners could recover damages. In Barnes v. Kent, 296 So2d 881, (1974); The plaintiff's land was divided by a stream, . . . and in that though southern portion of property could be reached by use of another route, such route would require 2 or 3 miles of travel. Therefore the plaintiff suffered damages differing from those of the general public. The petitioner herein is being deprived access to his land by the indirect route.

The Courts of Illinois referred to fence gates across the east portion of road. (App.10,42,57) (R-64,65.) The fence gates were needed to keep cattle or horses from running at large. (R-30) In Verh v. Morris, 101 N.E.2d 566, 410 Ill. 206: (1951) the erection of fences, bars, and gates will not affect or deminish the public rights in it or constitute abandonment in favor of an abutting owner. See Rodgers v. Hess, 156 N.E. 811 325 Ill. 603, (1927) Hensen v. Green, 113 N.E. 982, (1916) and Stevenson v. Meyer, 139 N.E.2d 740, (10 Ill.2d 335, (1957)

There was testimony that the east portion of road was used by people who contracted business with the petitioner, doing bulldozing, implement repairs, and other work on the severed land east of the creek. This should not change the character of the road from a public highway to an abandoned highway even though

fence gates were in place part of the time. (R-27,47,73.)

In Walden v. Bourn, 296 N.E. 2d 92, (1973) (4) Burden of proof is on party denying existence of public highway to show some grant or authority or permissive use of the same if such presumption is to be overcome. Existence of an alternate route has no bearing on question as to whether a public road exists. The petitioner and his predecessor in title and another witness testified that their use of the road was without permission. R-15,27,43,62,117.)

The courts hold that the test is not the number of persons actually using the road, or the frequency, quantum, or extent of use. See Taylor v. Wentz, 153 N. E.2d 812 (1958), Stevenson v. Meyer, and Verh v. Morris, supra. p. 23.

The petitioner graded so much of the east portion of roadway in 1970 with ap-

proval of the highway commissioner. In 39A C.J.S. p. 847, par. 130, (7); where a competent authority grants permission to use a right of way, not inconsistent with the purposes of the highway, and is not in derogation of rights of the public, there is no abandonment of the highway.

The trial court did not adequately describe the petitioner's real estate. The East Tract and the Western Tract were purchased under separate contracts, from different parties, free of all encumbrances, and were serviced by two different highways. The East Tract is now without access to the east public highway by way of the east portion of the old road that was adjudicated not essential at the time of abandonment therefore not essential now. See Rexroat v. Thorell at, 413 N.E.2d 1, 90 Ill. App. 3d 311, (1980) Supreme Court No. 54458. During 1942 or 1943, when the courts found the

road to be abandoned, the east portion crossing the respondent's land was the only way out to the east public highway. (App.32,33.) After at least 65 years of public use (1913 to 1978), the petitioner is the first owner of the East Tract to be deprived of beneficial enjoyment of his land through the termination of the township's interest in the east portion of the "old road".

The petitioner herein believes the record will show the use of the roadway in question at the time the court established the time of abandonment was very beneficial to the enjoyment of the land it served, as it has been to the petitioner and other predecessors in title.

Certiorari should be granted to protect vested property rights inherent to the right of access to and from the land.

CONCLUSION:

It is therefore respectfully submitted that the petition for writ of certiorari be granted.

June, 1982

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APPENDIX

IN THE CIRCUIT COURT OF MC DONOUGH COUNTY
NINTH JUDICIAL CIRCUIT
OF ILLINOIS

DIVISION ONE

WILLIAM G. REXROAT and MARY RUTH REXROAT,	)	
Plaintiffs,	)	
vs.	)	NO. 77-CH-1
RUSSELL THORELL,	)	
Defendant.	)	

Opinion filed February 28, 1979

The Honorable William L. Randolph, Circuit Judge, submitted the opinion.

MEMORANDUM OF OPINION

Bench trial on the merits started September 15, 1978, and then adjourned to October 16, 1978, for the purpose of allowing Plaintiff to present an evidence deposition, and to hear arguments of counsel. On October 16, 1978, trial was concluded, time allowed for the filing of briefs, and by leave of Court Plaintiff's brief was filed November 2, 1978.

Decision was reserved, and I am submitting this Memorandum Of Opinion as the decision thereon.

All of the real estate involved in this case is situated in Emmet Township, McDonough County, Illinois.

Defendant owns a farm which includes in its boundaries an 80 acre tract described as the west half of the southwest-Quarter of Section 33. A north-south public highway (either township or county), herein after referred to as "East Public Highway", runs along and adjacent to the east line of this 80 acres, being a distance of half a mile.

Plaintiff's farm is situated in a part of the southeast quarter of section 32 of said Township immediately west of and adjacent to Defendant's 80 acres so that the west boundary line of Defendant's 80 acres and the east boundary line of Plaintiff's farm constitute a common

boundary line between the two properties.

At the northeast corner of Plaintiff's farm Spring Creek enters Plaintiff's farm from the north, runs a short distance southwesterly and then meanders in a generally southerly direction across Plaintiff's farm more or less parallel to and a short distance west of the common property line between the parties.

The East Public Highway at the south end thereof joins a public highway county or township) which highway proceeds due west for approximately 1¼ miles and is hereinafter referred to as "South Public Highway". At the west end of the South Public Highway the public highway turns north and proceeds north on and along the west boundary line of said Section 32 for several miles, said latter segment of public highway being hereinafter referred to as the "West Public Highway".

In effect then these highways form a "U" in the area involved with the East Public Highway being the right side of the "U", the South Public Highway, being the bottom of the "U", and the West Public Highway being the left side of the U.

Plaintiff maintains that in 1913, and prior thereto, there was a public highway, hereinafter referred to as the "old road", which began approximately an eighth of a mile south of the northeast corner of Defendant's 80 acres and on the west line of the East Public Highway and that this old road then continued on westerly approximately an eighth of a mile and then in a generally southwesterly direction to the common boundary line between the farms owned by Plaintiff and Defendant. The old road, according to the plat offered in evidence by Plaintiff, then proceeded westerly across Plaintiff's land to Spring Creek and

thence on westerly entirely across what is now Plaintiff's land and then on northerly, westerly, southerly and back westerly until it connected up with the West Public Highway at a point about 1¼ miles due west of where the old road began at its eastern terminus over on the East Public Highway. Plaintiff maintains that the portion of said old road which proceeds westerly and southwesterly across Defendant's 80acre tract to plaintiff's east boundary line is still a public highway, and Plaintiff seeks a declaratory judgment to that effect and to enjoin Defendant from interferring with Plaintiff's claimed right to use this east part of the old road.

Plaintiff has in the northeast corner of his farm a tillable triangular shape piece of ground, referred to as "the seven acres" which is generally bounded on the northwesterly side by

Spring Creek, on the east by the common property line between the parties, and on the south by what would be the old road if the old road were in existence.

To bring farm machinery from the main part of the plaintiff's farm directly to the "seven acres" necessarily requires going east across Spring Creek with the farm machinery. There is no bridge or ford for this purpose. Defendant maintains the cost of a bridge would be prohibitive, and that fording the creek is not practicable because of the expense and also the uncertainty of success at times of high water. One of Plaintiff's witnesses testified that in 1937 where the old road crossed Spring Creek there was a ford, but conceded that since that time the creek has changed substantially in that the banks are much steeper and the creek is much deeper.

Plaintiff, therefore, maintains that

the only economically feasible way that he can reach the seven acres for farming purposes is to enter the old road at its eastern terminus where it begins on defendant's 80 acres, and to then proceed westerly and southwesterly on the old road across Defendant's farm and thence on the old road to Plaintiff's farm, where Plaintiff is then able to achieve the necessary access for his farm machinery into the seven acres.

The evidence indicates that, as claimed by Plaintiff, the old road was used as a public highway from approximately 1913 until approximately 1942, and thereby was established as a public highway by user for more than 15 years continuously, Ch.-121 Ill. Rev. Stats. 1977, Section 2-202. There is nothing to show that this road was ever dedicated by deed or official plat, so that the location of the old road must necessarily be deter-

mined from such physical evidence thereof as now remains on the ground. Defendant and one of his part-time employees by their testimony both indicate that in their view there is little indication on Plaintiff's land that there ever has been a road across it. Defendant testified that in 1968 when he acquired his 80 acre tract he was aware of nothing to alert him to the fact that there was any claim of a public road across his land. He testified that the title was checked carefully by his attorneys, and that in his view there was nothing visible on the land to indicate the possibility of a road. Plaintiff did submit in evidence a page from what was referred to as a 1913 plat book, but that page was from a "plat book" of the type normally published and sold by private groups, and while useful as a source of general information, it is unofficial publication prepared by

laymen and not to be confused with plats prepared by a surveyor and recorded in the County Recorder's office.

It does appear however that all parties now recognize where Plaintiff claims the old road goes across Defendant's 80 acres, and also recognize the visible indications and vestiges on the ground of where the old road went.

The portion of the old road at issue, being that portion which runs across Defendant's land, is best visualized by the photos submitted in evidence by the parties. Plaintiff's pictures indicating in a general way a summer view of the terrain across which the old road runs, and Plaintiff's pictures indicating the same general areas in winter. It seems generally agreed among the parties that all of the old road which does not go across Defendant's 80 acres has long ago been abandoned and vacated as a public highway

except for a short distance at the west end thereof used to connect a residence house with the West Public Highway. But Plaintiff maintains the portion of the old road across Defendant's 80 acres is still a public highway and should be open to Plaintiff as such, or, in the alternative, that Plaintiff has a prescriptive right to use the old road across defendant's land, or that such right exists by necessity.

At the point where the old road leaves Defendant's 80 acres and enters Plaintiff's farm there is a fence gate which must be opened in order for any person or vehicle to proceed through, Wally Lundberg owned Plaintiff's farm from 1950 until he conveyed it to Plaintiff in 1960, and Wally Lundberg testified that this fence gate across what was the old road remained throughout the time he owned the land. Plaintiff has since maintained the

same type fence gate during the time he has owned his farm. At this gate Plaintiff has posted on the fence post a "keep out" sign directed at anyone coming from Defendant's land. At the east end of the old road where it first enters Defendant's land there is a fence gate across the road, and Plaintiff testified that since he purchased his farm in 1960 there has always been some sort of gate or wires across the place where the old road begins on Defendant's 80 acres. It seems clear that the old road across Defendant's 80 acres has not been open to the general public for a long time. Without recounting all the evidence, I think it is clear that the old road across Defendant's 80 acres has not been used as a public road, nor has any effort been made to maintain same as such since at least about 1942 or 1943. Since then much of the old roadway has grown up in saplings

and has been obstructed by falling trees to an extent where Plaintiff on several occasions to get down the old road over the 80 acres to reach his 7 acres found it necessary to remove the dead trees and work on and maintain the road himself. Without further recounting the evidence on the issue I think it is clear that the public highway which formerly existed on what is now called the "old road" was long ago abandoned by the highway authorities, if not formally vacated. I would therefore find that there is no longer any public highway across Defendant's land as claimed by Plaintiff.

Also Plaintiff's claim of an easement by necessity must fail. For an easement by necessity to exist it is necessary that the dominant and servient tracts have been initially owned by one owner, it being the splitting of the two that creates the implied easement of neces-

sity. Miller Bros. Lumber Company vs. Mayfair Lumber Co. 4 Ill. App. 3rd 616, 279 N.E.2nd 389, 390 (1972): Libbee vs. Imhoff 11 Ill. App. 2d 344, 137 N.E. 2nd 85 (1956); Finn vs. Williams, 376 Ill. 95 33 N.E.2nd 226 (1941).

Plaintiff also claims that he has a right to proceed over the old road across Defendant's 80 acres by reason of an easement acquired through prescription. To establish such a prescriptive easement Plaintiff must prove his use of the claimed easement to have been adverse, uninterrupted, exclusive, continuous and under claim of right for twenty years. To be "exclusive" the claimed right must be such that it does not depend upon a like right in others. Petersen vs. Corrubia, 21 Ill. 2nd 29, 173 N.E. 2nd 499 (1961). To render a possession adverse, it must be hostile in its inception and so continue for the statutory period. Wiedrich

vs. Howard, 7 Ill. 2nd 589, 131 N.E. 2nd 508 (1956).

Wally Lundberg testified that during the ten years he owned what is now the Plaintiff's farm he sought to farm the "7 acres approximately five or six years. Apparently his first effort in that regard was about 1955 or 1956 when he testified he took his bulldozer back to the seven acres to clear it off, as it had laid idle prior to that time. Wally Lundberg also testified that at other times after that he took a disc and other farm machinery across the old road on what is now Defendant's 80 acres. He also testified as to the barbed wire gate across the entrance into what is now Defendant's 80 acres. Mr. Lundberg's testimony was to the effect that the public was apparently not using the old road while he owned his farm subsequently sold to Plaintiff. Mr. Lundberg testified that he

did not expressly ask for permission from the then owners of what is now Defendant's 80 acres stating that "as far as I knew" it was a public roadway. Plaintiff testifies that he farmed the 7 acres and used the old roadway across Defendant's 80 acres to do so about 70% of the time since he has owned his farm, and also that he continued to go down the old road at least once each year to do some work on the seven acres.

It seems that both Plaintiff and his predecessor in title, Wally Lundberg, went over what they claim to be the old road on Defendant's 80 acres with permission of the owners thereof, and without claiming any individual right of their own other than as members of the general public, and thereby did not give any notice of their adverse claim of a personal easement in the old road. This at least was the case until 1968 when Plaintiff

indicates that he did at least begin going upon the old road across the Defendant's 80 acres against the Defendant's will.

In Kirby vs. Kirby 236 Ill. 255, 265 (1908) it is stated:

> "from the earliest decision in this state to the present time it has been held that a party claiming title by adverse possession must prove his possession was adverse to the true owner, by clear and positive evidence. This cannot be established by inference but the proof must show clearly that the party in possession claimed the land as his own, openly and exclusively....adverse possession cannot be made out by inference or implication, for the presumptions are all in favor of the true owner, and the proof to establish it must be strict clear positive, and unequivocal. . The rule is, that every presumption will be made in favor of the holder of the legal title, and no presumption will be made in favor of the holder of color of title only".

Plaintiff has not put in the quantum of proof necessary to establish an easement by prescription.

Plaintiff does pose one last argument

which seems to be a spin-off from the argument of "necessity", which can be put in the form of a question as follows: "Where the only reasonably economically feasible access to Plaintiff's land is by a public road, and the public road is subsequently abandoned so that the public no longer have the right to use same, does Plaintiff still nonetheless have a valid claim to a personal private easement to use what was a public road for access to his land?"

Plaintiff cites cases from other jurisdiction indicating that this question should be answered in the affirmative. However, in Illinois, it would appear that a property owner so situated on vacation of a public highway would not retain an easement therein but could sue the highway authorities for damages. No. 3 Oakland Surburban Heights Inc. vs. Bekermeir 94 Ill. App. 2nd 67, 235 N.E. 2nd

867 (1968). By analogy it would seem that if there is a remedy on abandonment in these circumstances it would be analogous to the remedy on vacation.

For the reasons indicated Plaintiff's complaint must be dismissed and the relief therein requested denied.

I request Defendant's attorney to prepare an appropriate form of order, have same initialed as to form by attorney for Plaintiff, and submit it for entry.

IN THE CIRCUIT COURT OF MC DONOUGH COUNTY
NINTH JUDICIAL CIRCUIT
OF ILLINOIS

DIVISION ONE

WILLIAM G. REXROAT and MARY RUTH REXROAT,	)	
Plaintiffs,	)	NO. 77-CH-1
vs.	)	MOTION FOR
RUSSELL THORELL,	)	REHEARING
Defendant.	)	

Extract of proceedings, May 14, 1979, before the Honorable William L. Randolph

[1] The Court: All right, let the record show this is 77-CH-1, William G. Rexroat and Mary Ruth Rexroat, Plaintiffs vs. Russell Thorell, Defendant, and Plaintiff William G. Rexroat is present in his own proper person and both [2] Plaintiffs are present by attorney Daniel Nagan, and the Defendant Russell Thorell is not here in person, but is present by his attorney John Simshauser, and as I understand it we are here at this time in regard to the motion filed by Mr. Nagan for rehearing.

The Court: And the motion of the defendant in opposition thereto, and Mr. Nagan as I understand your motion basically you are asking for an additional and further hearing to argue certain principles of law in the case, is that basically what we are talking about?

Mr. Nagan: Yes, your Honor. I do have some documents I may wish to offer, but basically I am interested in review of certain legal principles.

[3] The Court: In other words you are not seeking to present any additional evidence or reopen the case for evidentiary purposes?

Mr. Nagan: No, your Honor.

[6] Mr. Nagan: Backing up to the easement of necessity concept and the common ownership element it has been my understanding that courts can, even on their own motion, take notice of records within their own courthouse as opposed to that

of another jurisdiction and I will concede that there was no evidence presented as to the formal ownership of the land, however the courthouse records would reflect that a John Wilson owned most of both parcels of that land back in about 1867 through 1897.

Mr. Simshauser: Your Honor, I am going to object. I think he is introducing facts that were not in evidence at the trial of this case and the Court knows we had a through trial at which time--

The Court: I think that is right, there was no evidence--

[7] Mr. Nagan: You are saying I could not present any further record of what I feel the Court could take notice of.

The Court: I see no basis to reopen the evidence in the case, no.

Mr. Nagan: Well as an offer of proof then I would just state for the record that I believe the records of the county

recorder would show that a John Wilson owned both parcels of land involved in this dispute and had severed them in 1897.

Mr. Simshauser: Your Honor, for the record I want to object to Mr. Nagans introduction of that into the record.

The Court: I think that should be and is stricken from the record I don't think it is relevant or pertinent to what we are here for today, but it is in the record the ruling is clear.

[9] Mr. Nagan: I feel that the evidence clearly indicated that any use by Mr. Rexroat and Mr. Lundberg in going back to the prior owners was clearly not with any permission. There was never any evidence of any permission granted by any of Mr. Thorell's predecessors in title. I would like the Court to review and see whether or not there has been an overly strict application of the elements of ad-

verse possession in this case.

[10] Mr. Nagan: The Court has basically ruled that the case on vacation of a public road would equally apply to abandonment. I feel that for a number of reasons the court should not make this judgment so easily, my understanding that the basic difference between vacation and abandonment is that vacation involved a formal procedure, abandonment is merely an informal lapse of use by the public, but I would first bring to the Courts attention that the evidence showed through the evidence deposition of Dale Kitch and through the testimony of Russell Thorell himself, that there was a hearing at one time back in the forties where part of the community actually filed a petition to vacate parts of the roadway, possibly the whole roadway.

As I recall Mr. Thorell on the witness stand even held some certain docu-

ments that he purported to evidence the result of this hearing, and I have with me what I, today, [11] a copy of the minutes that I believe that he was referring to and I would ask Mr. Simshauser, who it has been brought to my attention that Mr. Simshauser is the attorney representing Emmet Township Board. I would ask Mr. Simshauser--

Mr. Simshauser: May I interject there your Honor. I do not represent the Emmet Township Board, I am retained by the township supervisor to give him legal opinions from time to time, but I do not represent the Emmet Township Board.

Mr. Nagan: You represent the supervisor?

Mr. Simshauser: I have been retained by him to counsel with him on legal problems as they come up, yes.

Mr. Nagan: I would ask Mr. Simshauser whether or not the document that I am

holding with page 171 on the front, is a copy of the actual minutes of the board, that actually records the hearing that was testified to by Mr. Kitch and by Mr. Thorell.

Mr. Simshauser: Well, I decline to do so, Mr. Nagan, because I can't say either under oath or without, whether that is the instrument that Mr. Thorell referred to.

[12] Mr. Nagan: I did not have access to the documents. After the trial my client obtained these from the members of the township officials.

The Court: Well, I think there are two problems with offering these items in evidence at this time. I don't think it is a timely thing, we are past the evidentiary stage, secondly there is no showing that they are properly [13] documented to that this could be allowed into evidence even if they, even if this were

the time for admission, which I don't think it is, so for both of those reasons I don't believe these can be admitted in evidence and I will so rule. I don't know what they are, I haven't seen them.

Mr. Nagan: They went through this formal process and with or without these records I feel the testimony of Mr. Kitch and Mr. Thorell supports the fact there was a hearing, so the township recognizes that the distinction between vacation and abandonment, and they went through the formal procedures.

[14] Mr. Nagan: I feel that an attempt to take vacation procedures and apply the exact same rules to an abandonment in effect deprives my client of proper rights without any due process of law.

[15] Now, a number of years later my client is in the position where, where he has lost the very interest that it seems

his predecessors had protected back in the forties, or at the time of this vacation hearing.

[16] A third reason for a distinction the statute itself, on vacating and other activities in regard to township roadways at Sec. 6-305, the second full paragraph of Sec. 6-305 of Chapt. 121 reads that no road shall be laid out, widened, altered or vacated unless the highway commissioner finds that such alteration or vacation is in the public and economic interest, and further finds that any person residing or owning lands within two miles of any portion of the road proposed to be altered or vacated shall still have reasonable access parenthesis but not necessarily a direct route, close parenthesis, by way of a motor vehicle or other portable farm machinery commonly used in the area to farm land he owns or operates, and to community and trade cen-

ters after the road is altered or vacated. Such findings shall be contained in the memorandum of decision signed by the highway commissioner. So, if we are going to make a comparison it seems that even the vacation statute itself specifically expressly provides to ensure that no farmer is going to be cut off from any portion of his land by a vacation procedure. The way I read this it would be impossible through vacation procedures to do what the Courts ruling has been done through abandonment of use of the roadway. I would ask the Court to very carefully [17] read this section and reconsider whether or not the law allows someone to be cut off from the use of any part of their farmland through the termination of the township's interest in a roadway that once existed.

IN THE CIRCUIT COURT FOR THE NINTH JUDICIAL CIRCUIT
OF ILLINOIS, McDONOUGH COUNTY
DIVISION #1

JUN 18 1979

CIRCUIT CLERK

WILLIAM G. REXROAT and MARY RUTH REXROAT, Plaintiffs,	)	No. 77-CH-1
vs.	)	ORDER
RUSSELL THORELL, Defendant.	)	

This matter having come on for re-hearing pursuant to the request of the Plaintiff, and the Court having considered said Motion for Re-hearing pursuant to Section 68.3 of the Civil Practice Act, Illinois Revised Statutes, and having heard arguments of counsel, and thereafter having considered the matters and things set forth by counsel for the Plaintiff, and being fully advised in the premises, re-affirms its finding of the issues in favor of the Defendant and against the Plaintiff.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Order of this Court heretofore entered in this cause on May 12, 1979, be and same is re-affirmed.

Entered this 13th day of June, A.D. 1979.

William G. Kerr Jr.
JUDGE

IN THE CIRCUIT COURT OF MC DONOUGH COUNTY
NINTH JUDICIAL CIRCUIT
OF ILLINOIS

WILLIAM G. REXROAT and MARY RUTH REXROAT,	)	
Plaintiffs,	)	
vs.	)	NO. 77-CH-1
RUSSELL THORELL,	)	
Defendant.	)	

Extract of the evidence deposition of Ervin Dale Kitch, called for examination pursuant to the provisions of the Civil Practice Act and Rules of the Supreme Court, as they apply to taking of evidentiary depositions, on October 10, 1978, at Rural Route 1, Macomb, Illinois County of McDonough and State of Illinois.

Present:

Mr. Daniel Nagan, ESQ.
217 South Randolph
Macomb, Illinois
on behalf of the Plaintiffs;

Mr. John Simshauser, ESQ.
Masonic Temple Building
Macomb, Illinois
on behalf of the Defendant.

Ervin Dale Kitch, having been first duly sworn, was examined and testified on his oath as follows:

EXAMINATION

By Mr. Nagan:

[3] Q. Mr. Kitch, could you state your

full name and address, please.

A. Ervin Dale Kitch, Macomb, Illinois

Q. When were you born, sir?

A. July 29, 1898.

[4] Q. I would like to ask you a few questions about an old roadway running through sections 32 and 33 of Emmet Township in McDonough County, Illinois. I would hand you a document that has been marked Plaintiff's Exhibit 1, which is a copy of part of 1913 plat map of Emmet Township. I would refer you to sections 32 and 33 of that map and specifically to a roadway running approximately through the middle of it. I would ask you whether that roadway, as depicted in the map, would be substantially accurate to the best of your knowledge as of the time period of 1913.

A. Yes.

Q. Now when did you first know of this roadway?

A. I suppose about 1915.

[10] Q. Any other houses along that roadway?

A. Yes, there was one right down next to the creek on Mr. Rexroat's place and another one on just before you get to the east end of this road.

Q. Okay, who lived in the one down by the creek you have just referred to and during what periods of time that you know of?

A. Way back there in 1915 to 20 I suppose was when Mr. and Mrs. Folks lived there.

Q. Do you know of anyone living there after that time?

A. There was a Brown, but I can't tell you his first name.

Q. Would that be Lawrence Brown or Larry Brown?

A. Lawrence, I believe it was Lawrence.

[11] Q. And approximately what year would

this have been that he moved the house out?

A. That would be a guess, somewhere in the 40s. I would say late 40s.

[13] Q. During this period of 1915 to 1940, were you aware of any restrictions on who could use this roadway?

A. No.

[14] Q. Now, sir, have you ever held any public office for Emmet Township?

A. Have I? Q. Yes. A. Yes.

[15] Q. What office would that have been?

A. Road commissioner from 1940, except for two years, up to 71, and then I was assessor them two years.

Q. Which two years?

A. Lets see, just a second, 63 to 65.

Q. Did you ever do any work to maintain this particular road in your capacity as Emmet Township road commissioner?

A. Yes, sir, in the early 40s we

graded that hill and smoothed the road from Spring Creek east to the main road there.

Q. During this period, did you ever attend a meeting where any official action was voted upon in regards to any portion of this roadway?

A. Yes, sir.

Q. Approximately when was this meeting and who was there?

A. Well I don't remember the year.

[16] Q. Can you give us your best estimate?

A. I suppose it was in the 50s, 55 or somewheres in there. I don't remember.

[17] Q. And you say they brought the petitions requesting that part of the road be closed from Mr. William Rexroat's residence to where Mr. Clifford Rings now lives?

A. Right.

Q. And the township board voted on

this petition and approved it?

A. Yep.

Q. And since that particular meeting up to 1971, are you aware of any other board action in regards to this roadway?

A. No, sir.

CROSS-EXAMINATION

By Mr. Simshauser:

[18] Q. Was there a bridge across Spring Creek along this roadway?

A. No, sir, no.

Q. How did people get across the creek there?

A. Forded the Creek.

REDIRECT EXAMINATION

By Mr. Nagan:

[19] Q. Were you aware of any maintenance activity on this roadway by other people prior to you becoming road commissioner?

A. No, not until the last few years, and I think Mr. Rexroat has been maintaining it a little bit for his use.

SIGNATURE WAIVED.

IN THE APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

WILLIAM G. REXROAT, et al.,	)	
	)	
Appellant,	)	
	)	
vs.	)	NO. 79-513
	)	
RUSSELL THORELL,	)	
	)	
Appellee.	)	

Opinion filed October 15, 1980
Modified Opinion filed December 17, 1980

Mr. Justice Barry delivered the opinion of the court as modified upon denial of the petitions for rehearing.

The plaintiffs, William G. and Mary Ruth Rexroat, sought a declaratory judgment setting forth their right of access across an old roadway crossing a wooded pasture owned by the defendant, Russell Thorell, and servicing a small field on the plaintiffs' farm. Accessibility to the field from other than the old roadway is limited, because a stream running through the plaintiffs' farm cuts off ready access to the seven acre tract.

The plaintiffs sought relief on three theories. Two of those theories, namely, that an easement should be implied in law by necessity and that the plaintiffs and their predecessors in title acquired a prescriptive easement through adverse use were rejected by the trial court.

The third theory upon which the plaintiffs based their claim was that a public road had been created by fifteen years continuous adverse use by the general public, pursuant to Illinois Revised Statutes, 1977, ch. 121, Par. 2-202. The plaintiffs contended that, as owners of land abutting on a public road, they retained a private right of way following the abandonment of the road by the general public.

Following a bench trial, the court found that a public road had been created by fifteen years adverse use. However, the court ruled against the plaintiffs on

their theory of a retained private right of way. Judgment was entered accordingly and, following the denial of the plaintiffs' post-trial motion, this appeal was taken.

We are asked to decide whether a successor in interest to the user of an abandoned public road retains a private easement therein.

All of the real estate involved in this case is situated in Emmet Township McDonough County, Illinois. The defendant owns a farm which includes in its boundaries an 80 acre tract described as the west half of the southwest quarter of section 33. The plaintiffs' farm is situated in a part of the southeast quarter of section 32 immediately west of and adjacent to the defendant's 80 acres, so that the west boundary line of the defendant's 80 acres and the east boundary line of the plaintiffs' farm constitute a

common boundary line between the two properties.

Three public highways form a "U" shape around both farms, running along the east side of the defendant's farm, the common south boundary line of both farms, and the west side of the plaintiffs' farm.

At the northeast corner of the plaintiffs' farm, Spring Creek enters the farm from the north, runs a short distance southwesterly and then meanders in a generally southerly direction across the plaintiffs' farm more or less parallel to and a short distance west of the common property line between the parties.

The plaintiffs maintained that in 1913, and prior thereto, there was a public highway, hereinafter referred to as the "old road", which began approximately an eighth of a mile south of the northeast corner of the defendant's 80 acres and on the west line of the highway run-

ning along the east side of the defendant's farm, and that this old road continued in a generally southwesterly direction to the common boundary line between the farms owned by the plaintiffs and the defendant. The old road, according to the plat offered in evidence by the plaintiffs, then proceeded westerly across the plaintiffs' land to Spring Creek and thence on westerly entirely across what is now the plaintiffs' land to the highway running along the western side of the plaintiffs' farm.

The trial court found that a public road had been created by over fifteen years adverse use of the old road by the general public, from approximately 1913 to 1942, pursuant to Illinois Revised Stats., 1977, ch. 121par.2-202. The trial court also found that the road had been abandoned as a public highway around 1942 or 1943.

The plaintiffs have in the northeast corner of their farm a tillable, triangular shaped piece of ground, referred to as "the seven acres" which is generally bounded on the northwesterly side by Spring Creek, on the east by the common property line between the parties, and on the south by what would be the old road if the old road were in existence.

To bring farm machinery from the main part of the plaintiffs' farm directly to the seven acre tract requires going east across Spring Creek. There is no bridge or ford for this purpose. One of the plaintiffs' witnesses testified that, in 1937 where the old road crosses the creek there was a ford but conceded that since that time the creek has changed substantially in that the banks are much steeper and the creek has deepened.

The plaintiffs maintain that the only economically feasible access to the seven

acre tract of their farm which is isolated by Spring Creek is via the old road since the cost of a bridge would be prohibitive.

At the point where the old road leaves the defendant's farm and enters the plaintiffs' property, there is a fence gate which must be opened in order for any person or vehicle to proceed through. Wally Lundberg, who owned the plaintiffs' farm from 1950 until he conveyed it to the plaintiffs in 1960, testified that this fence gate across what was the old road remained throughout the time he owned the land. The plaintiffs have since maintained the same type fence gate during the time they have owned the farm. At this gate the plaintiffs have posted on the fence post a "keep out" sign directed at anyone coming from the defendant's land. At the east end of the old road where it first enters the defend-

ant's land there is a fence gate across the road, and the plaintiffs testified that since they purchased the farm in 1960 there has always been some sort of gate or wire across the place where the old road begins on the defendant's farm.

From the evidence, the trial court concluded that the old road had not been used as a public road nor had there been any effort to maintain it since at least 1942 or 1943. Upon this basis the trial judge found that the public highway which formerly existed on what is now called the old road was long ago abandoned by the highway authorities. No evidence of any type of formal vacation by local authorities was introduced.

Whether the plaintiffs, as abutting landowners, have a right of way in this abandoned road is the question now before us. Clearly they do not have an easement by necessity as such an interest requires

that the dominant and servient tracts have been initially owned by one owner, it being the splitting of the two that creates the implied easement of necessity (Finn v. Williams (1941), 376 Ill. 95, 33 N.E.2d 226; Freeland v. Dickson (4th Dist ..1978), 63 Ill. App. 3d 13, 379 N.E.2d 903). Likewise, the plaintiffs have not acquired a prescriptive easement in the old road since their use has not been adverse, continuous and uninterupted, under claim of right, with knowledge of the owner and without his consent for the statutory limitation period of twenty years (Mueller v. Keller 1960, 18 Ill. 2d 334, 164 N.E.2d 28; Roller v. Logan Landfill Inc. (4th Dist., 1974), 16 Ill.App. 3d 1046, 307 N.E.2d 424). In the case at bar, the plaintiffs' use of the old road cannot be considered hostile prior to 1968, the date when the defendant purchased the adjoining farm and first voic-

ed his objections.

Whether the plaintiffs retain a private easement in the abandoned road as abutting landowners appear to be a question of first impression in Illinois.

The trial court relied on No. 3 Oak land Suburban Heights Inc. v. Bekermeier (4th Dist., 1968), 94 Ill App. 3d 67, 235 N.E.2d 867, in deciding that no private easement rights were retained by the plaintiffs and that a suit for money damages represents the exclusive remedy for abutting landowners upon formal vacation of a public road. We find Bekermeier unpersuasive as applied to the factual situation found in the present case. Bekermeier concerned the rights of nonabutting land owners to seek money damages under Illinois Revised Statutes 1977, ch. 121, Par.6-315(a) following formal vacation of a public road and was decided on jurisdictional grounds. The question of wheth-

er the landowner could forego money damages and retain use of a private right of way was never presented or decided in Bekermeier.

One early Illinois Supreme Court case Thomas v. Metz (1928), 236 Ill. 86, 86 N.E. 184 appears to hold that if an individual can prove use of an alley for a period of more than twenty years, he can claim an easement in the alley following its vacation or abandonment. (236 Ill. 86, 94, 86 N.E.184, 187). The reasoning behind this opinion is obscure, however, and no later case law has been found to elucidate its findings.

As the plaintiffs note in their brief the most thorough analysis of the issue now before us is contained in 150 A.L.R. 644 (1944), in an annotation entitled "Private easement in way vacated, abandoned, or closed by public." The majority view which emerges from a review of the

cases collected there is noted in section II(a) of the annotation as follows:

> "Where a landowner has a private right of way in a strip of land which is or subsequently becomes a public street or highway, such private right is ordinarily held to survive the vacation or abandonment of the street or highway by the public." (150 A.L.R. 645)

A minority view, which holds that private easements in a way become merged in the rights of the public when the way becomes a public street or highway and are not revived upon the vacation or abandonment of the street or highway by the public, is found in cases from New York, Maryland and New Jersey. See Barber v. Woolf (N.Y. Ct of App. 1915), 167 App. Div. 627, 153 N.Y.S. 139 (affirmed in (1915), 216 N.Y. 7, 109 N.E. 868 and Libertini v. Schroeder (Ct of App. of Md, 1926), 148 Md. 484, 132 A. 64.

In section III (b) of the annotation contained in 150 ALR 644 (1944), the following rule is stated:

> "Where one is deemed to acquire a private easement in a public or highway from the mere fact that his property abuts thereon, such easement continues not withstanding the vacation, abandonment or closing of the street or highway.

Although neither the majority rule found in section II (a) of the annotation nor the rule expressed in section III (b) reflects the specific factual situation now before us, we elect to adopt the position expressed in those rules. Thus, although the abandoned roadway in the case at bar does not abut the plaintiff's land but runs to and through it and there is no evidence to show that plaintiffs or their predecessors in interest had a private easement in the roadway benefiting the plaintiffs' land.

The record reveals that the public roadway was abandoned around 1942, that plaintiffs and their predecessors in interest have continued to use regularly, though not continuously, a portion of the

roadway as a private right-of-way to the isolated seven acre plot on plaintiffs' land since the abandonment, and that such access has been the only means of access for many years. Under these circumstances the fact that alternative means of access may be possible, i.e. via construction of a bridge across Spring Creek or by developing a roadway running north along the east bank of Spring Creek from the public highway abutting the southern boundary of plaintiffs' land, both costly and complicated procedures, does not alter our decision. The plaintiffs rights to an easement implied by law need not be based on absolute necessity. As the court in Puszkiewcicz v. Friedlander (1st Dist. 1973), 12 Ill. App. 3d 1017, 299 N.E.2d 400, stated, after summarizing Illinois case law on the question of "necessity" in regard to a claim of easement implied by law:

> "In such cases it is not necessary that the claimed easement be absolutely necessary for the enjoyment of the estate granted, but it is sufficient that it is reasonable and highly convient and beneficial thereto." (12 Ill App. 3d 1017, 1021, 299 N.E. 2d 400, 403, quoting from Deisenroth v. Dodge, (1955), 7 Ill. 2d 340 346, 131 N.E.2d 17, 21).

The plaintiffs in the case at bar have certainly met this standard.

The defendant argues that the plaintiffs should be estopped from claiming an easement in the abandoned roadway because they have maintained an obstruction across the roadway, namely a fence on which is posted a "keep out" sign. We find this argument unpersuasive, since the cases on which the defendant relies indicate that one who has received compensation for the value of his easement is thereafter estopped from asserting rights to a private easement. (See Barber v. Woolf (N.Y. Ct of App., 1915), 167 App. Div. 627, 153 N.Y.S. 139 (affirmed

in (1915) 216 N.Y. 7, 109 N.E. 868). Because the plaintiffs in the case at bar have received no compensation, the estoppel argument presented by the defendant is inapposite.

Likewise, we find the defendant's laches argument unpersuasive. The defendant has shown no prejudice to himself resulting from the plaintiffs' delay in bringing suit. See, Keessen v. Zarattini (1st Dist., 1969), 119 Ill. App. 2d 284, 256 N.E.2d 377). Furthermore, the defendant suffered plaintiffs' continued use of his property after first voicing objections to the plaintiffs in 1968. Under these circumstances equitable considerations argue against any application of the laches doctrine to bar the plaintiffs' suit.

Because we hold that the plaintiffs' use of the abandoned right of way has created an easement benefitting their

land we reverse the judgment of the Circuit Court of McDonough County, and remand this cause to the trial court with directions to declare and define the plaintiffs' easement.

Judgment reversed and remanded with directions. Reversed.

ALLOY, P. J., AND STOUDER, J., CONCUR

IN THE
SUPREME COURT OF ILLINOIS

WILLIAM G. REXROAT, et. al., Appellees,	)	
vs.	)	NO. 54458
RUSSELL THORELL, Appellant.	)	

Opinion filed January 21, 1982

Mr. Justice Underwood delivered the opinion of the court:

This action involves a dispute over the right of the plaintiffs, William G. and Mary Ruth Rexroat, to use an old dirt roadway across land owned by the defendant Russell Thorell, as a private right of way to gain access to some seven acres of plaintiffs' farm. Plaintiffs filed a complaint in the circuit court of McDonough County seeking a declaratory judgment, injunctive relief and money damages. That complaint was dismissed by the trial court, which stated in a writ-

ten opinion its reasons for doing so. The appellate court reversed and remanded (90 Ill. 3d 311), and we allowed defendant's petition for leave to appeal.

The parties own adjoining farms in McDonough County. Plaintiffs purchased theirs in 1960 and 1961; defendant bought his property in 1968. Plaintiffs' farm is directly west of and adjacent to the 80-acre tract owned by defendant. Three public highways form a "U" shape around both farms. The following rough diagram adapted from defendant's petition for leave to appeal, shows the relevant portions of the land and is helpful in understanding the physical arrangement.

In the northeast corner of plaintiffs farm is a tillable triangular shaped piece of ground consisting of about seven acres. This portion of the farm is bounded on the north-westerly side by Spring Creek, on the east side by the

common property line between the parties, and on the south by an old dirt road which at one time ran through the property now owned by defendant. A portion of the land south of the old road and east of Spring Creek was sold by plaintiffs, who reserved a 16-foot easement across the conveyed land for purposes of ingress and egress to the land, including the seven acres, retained by plaintiffs. That easement commenced at the south public highway midway between Spring Creek and the west boundary of defendant's property and ran almost due north to plaintiffs retained land.

The old road, according to the plaintiffs and as described by the trial court "began approximately an eighth of a mile south of the northeast corner of defendant's 80 acres and on the west line of the west line of the East Public highway and then continued on westerly approxi-

mately an eighth of a mile and then in a generally southwesterly direction to the common boundary line between the farms owned by plaintiffs' and defendant. The old road then proceeded westerly across plaintiffs' land to Spring Creek and thence on westerly entirely across what is now plaintiffs' land and then on northerly, westerly, southerly, and back westerly until it connected up with the West Public Highway as a point about 1¼ miles due west of where the old road began at its eastern terminus over the East Public Highway." Both parties have maintained fence gates at the points where the old road begins on their respective properties: at the east end of the old road where it begins on defendant's property a fence gate has existed since the time plaintiffs purchased their property in 1961 and some years prior thereto; at the point where the old road leaves de-

fendant's land and enters plaintiffs' farm, a fence gate has also existed for an appreciable length of time, and after plaintiffs acquired their land they painted a "keep out" sign on their fence post directed at anyone coming from defendant's land.

At the point where the old road crossed Spring Creek there was a ford; however, testimony indicated that the creek had substantially changed over the years, in that the banks are now much steeper and the creek much deeper. William Rexroat testified to unsuccessful attempts to drive a bulldozer and farm machinery across the creek where it intersects the old road to reach his seven acres. He also testified to unsuccessful attempts to reach the seven acres from the south public highway along the east side of Spring Creek. He and Wally Lundberg, plaintiffs' immediate predecessor in ti-

tle, testified that there was a swamp in this area and the land frequently flooded in the spring.

No recorded document indicated the road existed. The portion which ran through defendant's land had been used by the public for some years beginning in about 1913, but as the trial court found, it had not been maintained since at least 1942 and had grown up in saplings and been obstructed by falling trees. The parties generally agreed that the portion of the road which did not run through defendant's land, with the exception of a small portion, at the west end, had been abandoned as a public road many years before they purchased their respective properties. The defendant testified that at the time he purchased his land, there was no visible indication that a road existed on it. However, both William Rexroat and Wally Lundberg testified that they used

the road on several occasions. But Lundberg stated that the road was not in good condition in 1951 when he purchased his property, and plaintiff testified that he had to perform major work on the road by removing dead trees and logs and grading the road in order to make it passable. In addition, portions of the road periodically washed out to the extent that passage became blocked.

Plaintiffs based their claim for relief upon four possible theories: (1) that a private easement existed by way of necessity; (2) that a private easement existed by prescription; (3) that a public highway still existed, or, in the alternative, (4) if a public highway no longer existed, that a private easement of necessity arose following the abandonment of the road by the general public. The trial court held that a public highway had been created by user for more

than 15 years (Ill. Rev. Stat. 1977, ch. 121, par. 2-202), but that it had been abandoned sometime in 1942 or 1943. Neither party challenges these findings on appeal. The court rejected the plaintiffs' claim that an implied easement of necessity existed, because there was no evidence that the plaintiffs' and defendant's tracts had been part of one estate initially and subsequently severed as required to create such an easement. (See People ex rel. Helgeson v. Hackler (1961) 21 Ill.2d 267,270; Finn v. Williams(1941) 376 Ill. 95,99.) The court also rejected plaintiffs' claim that they had acquired an easement by prescription, finding that any use by plaintiffs and their predecessor in title, Wally Lundberg, was permissive—at least until 1968. Finally, the court held that a private easement did not arise following the abandonment of the public roadway because the judge

found no support in Illinois law for this proposition. On rehearing, the court further stated that plaintiffs' argument on the necessity of an implied easement was substantially diluted by the fact that William Rexroat testified he had retained an express easement for the purpose of reaching the seven-acre tract across land sold by plaintiffs. He stated he did so because of the "questionable nature" of his right to use the old road.

The appellate court reversed, holding that the abandonment of the public roadway under these facts created a private easement in the road benefiting plaintiffs' land. In so holding, the court relied primarily upon several out-of-state decisions collected in an A.L.R. annotation. (See Annot., 150 A.L.R. 644 (1944). The court rejected the claim that the possibility of alternative means of access should defeat plaintiffs' right

to an implied easement; "Under these circumstances the fact that alternative means of access may be possible, i.e. via construction of a bridge across Spring Creek or by developing a roadway running north along the east bank of Spring Creek from the public highway abutting the southern boundary of plaintiffs' land, both costly and complicated procedures, does not alter our decision. The plaintiffs' rights to an easement implied by law need not be based on absolute necessity, "90 Ill. App.3d 311, 315.

The only issue raised in this court is whether plaintiffs have acquired a private easement in the old road from reasonable necessity by virtue of its abandonment as a public highway several years prior to the time they purchased their land. Defendant urges reversal of the appellate court's holding in part because plaintiffs failed to show reason-

able necessity. Plaintiffs contend that the record supports their assertion that the cost of constructing an alternative means of access is prohibitive and that the appellate court's finding that such procedures are both complicated and costly should be sustained.

The majority of courts considering a landowner's rights following the vacation or abandonment of a public way have held that a private right-of-way which existed prior to the establishment of a public way survives the vacation or abandonment by the public. (See Annot.,150 A.L.R. 644, 645,-46 (1944); cf.Thomas v Metz (1928), 236 Ill. 86(dicta sometimes cited as supporting Plaintiffs' position); see also 39 Am. Jur. 2d Highways, Streets, and Bridges Sect. 185 n.17 (1968). Moreover, many courts have held that a private easement arises in a public highway following its vacation or abandonment

from the mere fact the landowner's property abuts thereon. (e.g. Knierim v. Leatherwood (Tenn. 1976), 543 S.W.2d 806, 810,-11; Jackson v. Birmingham Foundary & Machine Co. (1908), 154 Ala. 464, 45 So. 660; Annot.,130 A.L.R. 657,658(1941). Although title to the land vests in the owner of the fee, it is subject to the rights other landowners may have in the street as the necessary means of access to their property. (Greenberg v. L.I. Snodgrass Co. (1954), 161 Ohio St. 351, 361, 119 N.E. 2d 292,297; Taylor v. Cox (1951), 218 S.C. 488,492, 63 S.E.2d 470 472.) It is thus recognized that the only easements which survive or arise are those ressonably necessary for means of ingress and egress, Taylor v. Cox (1951), 218 S.C. 488, 63 S.E.2d 470;Jackson v. Birmingham Foundary & Machine Co. (1908), 154 Ala. 464, 45 So.660; 39 Am. Jur.2d Highways, Streets, and Bridges

Sect. 185 (1968); 39A C.J.S. Highways Sect. 137 (1976).

The above principles are not directly applicable to the factual situation with which we are presented, as the appellate court noted, because there is no evidence that a private easement prior to the creation of the public way, and the old road does not abut the plaintiffs' land but runs to and through it. Application of the cited rules is further complicated by the fact that the roadway at issue here was never publicly recorded in contrast to the overwhelming majority of out-of-state decisions. The record demonstrates that the road fell into a state of disrepair following its abandonment by the public, and it became impassable until later efforts were made to clear it. Such a situation may well present the question whether the owner of the servient tract had either actual or constructive notice

of the possibility of a claimed easement over his land. Without that notice, of course, he ordinarily takes title free from the burden of the easement. (See Willoughby v. Lawrence (1886), 116 Ill. 11,20; 25 Am. Jur. 2d Easements and licenses Sect. 97 (1966). In this case, whether the condition of the land was such as to give defendant reasonable notice of the roadway was sharply disputed, and the trial court did not make a specific finding on this issue. We need not remand on this question, however, since we believe that plaintiffs failed to sustain their burden of showing necessity.

Plaintiffs purchased their land some 18 years following the abandonment of the old road by the general public. If a private easement existed at the time plaintiffs acquired this land, it arose in the early 1940s when the trial court found that the old road was abandoned by the public. Since none of plaintiff's prede-

cessors in title sought to enforce such a right, it was incumbent upon the plaintiffs, whose burden it is to show facts necessary to create an easement by implication (Traylor v. Parkinson (1934), 355 Ill. 476,479; Bontz v. Stear (1918), 285 Ill. 599,604), to prove that the circumstances were such that at the time the public road was abandoned a private easement arose. If the necessity to use this road to gain access to the seven-acre portion of their farm arose because of changed conditions upon the plaintiffs' land, as the record would indicate, their claim must fail.

In VanPatten v. Loof (1932), 349 Ill. 483, the court considered whether an easement existed from necessity over the appellee's land in favor of the appellant, whose only other means of ingress and egress to his property was by means of a navigable body of water. The court

determined that in 1885, several years prior to the litigation, which was the year the estate was severed, the appellant's land was best suited for lake excursions and as such there was no need for an easement over appellee's land.

Thus, the court concluded:

> No matter how much conditions may have changed since the time [appellant] got his deed, no implication of a grant of easement can ever arise from such changed conditions. The implication, if any, must have been contemporaneous with the execution of the deed. (349 Ill. 483, 487.)

(See also Restatement of Property Section 474, comment a (1944) (implication arises upon severance); People ex rel. Helgeson v. Hackler (1961), 21 Ill.2d 267, 271; Deisenworth v. Dodge (1955), & Ill.2d 340 346; Walker v. Witt (1954), 4 Ill. 2d 16, 20,) So, too, the implication in this case must have arisen, if at all, at the time of the abandonment of the old road by the general public.

While a showing of absolute necessity is not required in Illinois to create an implied easement of necessity upon the severance of land into two or more tracts (People ex rel. Helgeson v. Hackler 1961 21 Ill.2d 267,271), an easement by implication is not sanctioned if available alternatives, affording reasonable means of ingress and egress exist (Traylor v. Parkinson (1934), 355 Ill. 476,481; Van-Patten v. Loof (1932), 349 Ill. 483; H. Tiffany, Real Property Sect. 794, at 293-96 (3d. ed.(1939). Although plaintiffs presented some evidence tending to establish that it would have been costly at the time of trial in 1978 to construct a road along the east side of Spring Creek running northward from the south public highway (William Rexroat estimated that it would cost $2,000 to $3,000), or to ford the creek at the point where it intersects the old road (Rexroat estimated

that it would initially cost $300 to $400 and then the channel of the creek could wash out that effort), there was no evidence presented as to the unavailability of alternative routes at the time the road was abandoned by the public. Indeed, one witness testified that in 1937 the ford in the creek provided good access but that the creek had substantially changed over the years. Moreover, even the evidence presented by the plaintiffs as to the cost and effort necessary to provide an alternative means of access from their own land was disputed by defendant, who stated that the cost and effort in fording the creek was minimal, and the trial court, while not directly deciding the question appears to have resolved this issue against the plaintiffs. We thus hold that plaintiffs failed to establish that the use of the old roadway at the time of the public abandonment was

essential to the beneficial enjoyment of the land now owned by the plaintiffs, and, therefore, a private easement did not then arise and does not now exist.

The appellate court judgment is accordingly reversed, and the judgment of the circuit court is affirmed.

Appellate court reversed;
circuit court affirmed.

54458

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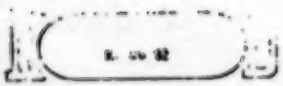

Robert H. Gillespy
Clerk

March 25, 1982

Mr. Daniel P. Hagan
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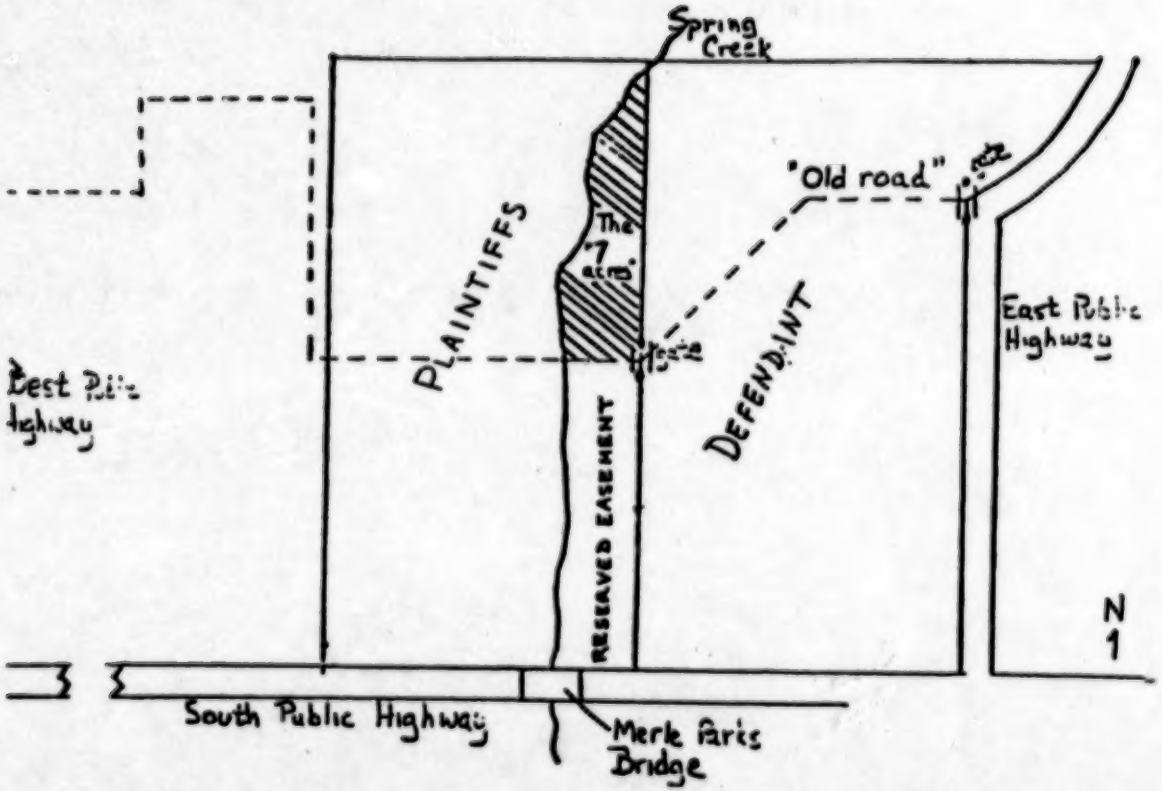
No. 54458 - William G. Rexroat, et al., appellees, vs. Russell Thorell, appellant. Appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

Very truly yours,

Robert H Gillespy

Clerk of the Supreme Court


Spring Creek
"Old road"
PLAINTIFFS
The acre
DEFENDANT
East Public Highway
West Public Highway
RESERVED EASEMENT
N
1
South Public Highway
Merle Faris Bridge

SECTION 32 and 33 EMMET TOWNSHIP, MC DONOUGH COUNTY (1913)